

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Time Warner Cable Inc.)	CSR 7226-E
)	
)	
Petition for Determination of Effective Competition)	
in Five Local Franchise Areas in Arizona and)	
California)	

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 2007

Released: October 16, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner Cable Inc. ("Time Warner") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that its cable systems serving the communities listed in Attachment A (the "Communities") are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act"),¹ and the Commission's implementing rules,² and are therefore exempt from cable rate regulation in the Communities. No opposition to the petition was filed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(1) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵ Based on the record in this proceeding, Time Warner has met this burden.

II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video

¹ 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(4).

³ 47 C.F.R. § 76.906.

⁴ See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁵ See 47 C.F.R. §§ 76.906 & 907.

programming distributors ("MVPD"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁶ Turning to the first prong of this test, we find that the DBS service of DirecTV Inc. ("DirectTV") and DISH Network ("Dish") is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁷ The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV was the second largest, and DISH the third largest, MVPD provider during this period.⁸ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the communities listed on Attachment A are DBS subscribers, we conclude that the population of the communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer substantially more than 12 channels of video programming, including more than one non-broadcast channel.⁹ We further find that Time Warner has demonstrated that the Communities listed on Attachment A are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

4. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Time Warner sought to determine the competing provider penetration in the Communities listed on Attachment A by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code basis. Time Warner determined the competing provider penetration levels in the franchise areas by applying a five-digit zip code allocation method.¹⁰ Time Warner asserts that it is the largest MVPD in Yuma, Arizona, because its subscribership exceeds the aggregate DBS subscribership for those franchise areas.¹¹

5. With regard to San Luis and Somerton, Arizona, and Winterhaven, California, Time Warner contends that although it cannot demonstrate that it is the largest MVPD in these franchise areas because the SBCA aggregates the DBS subscribership figures, it still has satisfied the second prong of the competing provider test for these Communities.¹² Time Warner claims to be subject to competing provider competition in these communities because DBS penetration exceeds 15 percent of occupied households, and because the number of Time Warner subscribers also exceeds 15 percent of the occupied

⁶ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸ *Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73, 21 FCC Rcd 2503 (rel. March 3, 2006).

⁹ *See* 47 C.F.R. § 76.905(g).

¹⁰ *Id.* at 8-9.

¹¹ Time Warner Petition at 7.

¹² *Id.* at 8.

households, as reported by the 2000 Census.¹³

6. Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data, we find that Time Warner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the communities listed on Attachment A. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable systems serving those four communities mentioned above are subject to competing provider effective competition.

B. Low Penetration Effective Competition

7. As for Yuma County, Arizona, Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if “fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system.”¹⁴ Time Warner provided information showing that less than 30 percent of the households within Yuma County subscribe to its cable services.¹⁵ Accordingly, we conclude that Time Warner has demonstrated the existence of low penetration effective competition under our rules.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition filed by Time Warner Cable Inc for a determination of effective competition in the Communities listed thereon **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the local franchising authorities overseeing Time Warner Cable Inc **IS REVOKED**.

10. This action is taken pursuant to authority delegated under Section 0.283 of the Commission’s rules.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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¹³ *Id.*

¹⁴ 47 U.S.C § 543(l)(1)(A).

¹⁵ 5,718 Time Warner subscribers ÷ 53,848 Yuma County households = 10.62 percent.

¹⁶ 47 C.F.R. § 0.283.

Attachment A

Cable Operator Subject to Competing Provider Effective Competition

TIME WARNER CABLE INC: 7226-E

Communities	CUIDS	CPR*	DBS Subscribers ⁺	2000 Census Household
San Luis	AZ0165	32.85%	1,512	3,018
Somerton	AZ0039	32.85%	1,512	1,818
Yuma	AZ0019	27.70%	11,268	26,649
Winterhaven	CA0696	35.75%	2,604	183

CPR= Percent DBS penetration

+ = See Cable Operator Petitions